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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 616

THE UNITED STATES OF AMERICA, APPELLANT

vs.

LEAMON RESLER AND LEAMON RESLER, DOING BUSINESS AS RESLER TRUCK LINE AND AS BRADY TRUCK LINE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

FILED DECEMBER 10, 1940

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1 In United States District Court for the
District of Colorado

Sitting at Denver

[Caption omitted.]

9197

THE UNITED STATES OF AMERICA

vs.

LEAMON RESLER, DOING BUSINESS AS RESLER TRUCK LINE AND AS BRADY TRUCK LINE

Information: Violation of Motor Carrier Act

Order directing filing of information

July 25, 1940

At this day comes Joseph N. Lilly, Esquire, Assistant District Attorney, who prosecutes the pleas of the United States in this behalf, and presents to the court now here an information for violation of Motor Carrier Act against Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line.

And thereupon, it is ordered by the court that the said information be filed.

2 In United States District Court for the
District of Colorado

[Title omitted.]

Information

Filed July 25, 1940

Now comes Thomas J. Morrissey, United States Attorney in and for the District of Colorado, who for the United States in this behalf prosecutes, in his own proper person, and with leave of Court first had and obtained, gives the Court here to understand and to be informed as follows, to wit:

Count 1

That on, to wit, August 28, 1939, Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line, defendant, then and there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and

foreign commerce by motor vehicle on public highways including those between the points hereinafter set forth, for compensation, unlawfully did knowingly and wilfully engage in an interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Denver, Colorado, to Fort Collins, State and District of Colorado and within the jurisdiction of this Court, certain property, to wit, one box each of iron bolts, small arms cartridges, metal alarm clocks, plain iron screws, yard stick wood, enameled ware, fly swatters, and 2 boxes of paint in cans, of an aggregate weight of, to wit, 535 pounds, for
3 compensation, to wit, $2.23, which said property was then and there moving in interstate commerce in the course of through transportation from Hibbard, Spencer, and Bartlett, Chicago, Illinois, consignor, to Toliver and Kinney Mercantile Company, at said Fort Collins, then and there without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Section 306 (a) Title 49, U. S. Code.)

Count 2

That on, to wit, August 3, 1939, Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line, defendant, then and there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and foreign commerce by motor vehicle on public highways including those between the points hereinafter set forth, for compensation, unlawfully did knowingly and wilfully engage in an
4 interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Denver, Colorado to Fort Collins, State and District of Colorado and within the jurisdiction of this Court, certain property, to wit, one box of putty, two cartons of oil cans and one roll of wire, of an aggregate weight of, to wit, 237 pounds, for compensation, to wit, 90 cents, which said property was then and there moving in interstate commerce in the course of through transportation from Paxton and Gallagher, Omaha, Nebraska, consignor, to Toliver and Kinney Mercantile Company, at said Fort Collins, then and there without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Section 306 (a) Title 49, U. S. Code.)

Count 3

That on, to wit, August 23, 1939, Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line, defendant, then and there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and foreign commerce by motor vehicle on public highways including those between the points hereinafter set forth, for compensation, unlawfully did knowingly and wilfully engage in an interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Denver, Colorado, to Fort Collins, State and District of Colorado and within the jurisdiction of this Court, certain property, to wit, 15 cartons of bicycles and 1 carton of equipment, of an aggregate weight of, to wit, 1,312 pounds, for compensation, to wit, $8.53, which said property was then and there moving in interstate commerce in the course of through transportation from Arlod Schwinn and Company, Chicago, Illinois, consignor, to Toliver and Kinney Mercantile Company, at said Fort Collins, then and there without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Section 306 (a) Title 49, U. S. Code.)

Count 4

That on, to wit, April 15, 1939, Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line, defendant, then and there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and foreign commerce by motor vehicle on public highways including those between the points hereinafter set forth, for compensation, unlawfully did knowingly and wilfully engage in an interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Denver, Colorado to Fort Collins, State and District of Colorado and within the jurisdiction of this Court, certain property, to wit, 4 bundles of forks, of an aggregate weight of, to wit, 115 pounds, for compensation, to wit, 40 cents, which said property was then and there moving in interstate commerce in the course of through transportation from Hibbard, Spencer, Bartlett and Company, Chicago, Illinois, consignor, to Toliver and Kinney Mercantile Company, at said Fort Collins, then and there without there being in force with respect to defendant a certificate of public

convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Section 306 (a) Title 49, U. S. Code.)

Count 5

That on, to wit, July 7, 1939, Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line, defendant, then and there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and foreign commerce by motor vehicle on public highways including those between the points hereinafter set forth, for compensation, unlawfully did knowingly and wilfully engage in an interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Denver, Colo-
6 rado, to Fort Collins, State and District of Colorado and within the jurisdiction of this Court, certain property, to wit, 2 crates of bicycles, of an aggregate weight of, to wit, 118 pounds, for compensation, to wit, 65 cents, which said property was then and there moving in interstate commerce in the course of through transportation from Arnold Schwinn and Company, Chicago, Illinois, consignor, to Toliver and Kinney Mercantile Company, at said Fort Collins, then and there without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Section 306 (a) Title 49, U. S. Code.)

Count 6

That on, to wit, July 20, 1939, Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line, defendant, then and there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and foreign commerce by motor vehicle on public highways including those between the points hereinafter set forth, for compensation, unlawfully did knowingly and wilfully engage in an interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Denver, Colorado to Fort Collins, State and District of Colorado and within the jurisdiction of this Court, certain property, to wit, one box each of hand saws, lead shot, rake head iron, one bundle of wooden handles, and three boxes of filters, of an aggregate weight of, to wit, 115

pounds, for compensation, to wit, 52 cents, which said property was then and there moving in interstate commerce in the course of through transportation from Hibbard, Spencer, Bartlett
7 and Company, Chicago, Illinois, consigner, to Toliver and Kinney Mercantile Company, at said Fort Collins, then and there without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Section 306 (a) Title 49, U. S. Code).

Count 7

That on, to wit, August 22, 1939, Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line, defendant, then and there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and foreign commerce by motor vehicle on public highways including those between the points hereinafter set forth, for compensation, unlawfully, did knowingly and wilfully engage in an interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Denver, Colorado to Fort Collins, State and District of Colorado and within the jurisdiction of this Court, certain property, to wit, 7 boxes of sheet steel ware nested solid, of an aggregate weight of, to wit, 110 pounds, for compensation, to wit, 39 cents, which said property was then and there moving in interstate commerce in the course of through transportation from Hibbard, Spencer, Bartlett and Company, Chicago, Illinois, consignor, to Toliver and Kinney Mercantile Company, at said Fort Collins, then and there without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Section 306 (a) Title 49, U. S. Code.)

8 Count 8

That on, to wit, May 11, 1939, Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line, defendant, then and there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and foreign commerce by motor vehicle on public highways including those between the points hereinafter set forth, for compensation, unlawfully did knowingly and wilfully engage in an

interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Denver, Colorado, to Fort Collins, State and District of Colorado and within the jurisdiction of this Court, certain property, to wit, 3 cartons of candy, of an aggregate weight of, to wit, 168 pounds, for compensation, to wit, 47 cents, which said property was then and there moving in interstate commerce in the course of through transportation from Reed Candy Company, Chicago, Illinois, consignor, to Richer Brothers, at said Fort Collins, then and there without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Section 306 (a) Title 49, U. S. Code.)

Count 9

That on, to wit, April 29, 1939, Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line, defendant, then and there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and foreign commerce by motor vehicle on public highways including those between the points hereinafter set forth, for
9 compensation, unlawfully did knowingly and wilfully engage in an interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Denver, Colorado, to Fort Collins, State and District of Colorado and within the jurisdiction of this Court, certain property, to wit, 6 boxes gas lamps with shades, 13 boxes gas lanterns with globes, 1 box brass hardware and 1 box gas self-heating sad irons, of an aggregate weight of, to wit, 102 pounds, for compensation, to wit, 59 cents, which said property was then and there moving in interstate commerce in the course of through transportation from Coleman Lamp and Stove Company, Wichita, Kansas, consignor, to Toliver and Kinney Mercantile Company, at said Fort Collins, then and there without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Section 306 (a) Title 49, U. S. Code.)

Count 10

That on, to wit, June 21, 1939, Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line, defendant, then

and there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and foreign commerce by motor vehicle on public highways including those between the points hereinafter set forth, for compensation, unlawfully did knowingly and wilfully engage in an interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Denver, Colorado, to Fort Collins, State and District of Colorado and within the jurisdiction of this Court, certain property, to wit, 1 box each of mica, iron hinges, electric incandescent lamps, hand tools, iron wedges, garbage cans, tinware, aluminum utensils, 1 bundle whips, 2 rolls wire cloth, 3 boxes dry cell batteries, 1 crate iron ware, 2 boxes horse shoe nails, 6 boxes lantern globes, and 3 boxes of paper ware, of an aggregate weight of, to wit, 718 pounds, for compensation, to wit, $4.69, which said property was then and there moving in interstate commerce in the course of through transportation from Hibbard, Spencer, Bartlett and Company, Chicago, Illinois, consignor, to Toliver and Kinney Mercantile Company, at said Fort Collins, then and there without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Section 306 (a) Title 49, U. S. Code.)

Count 11

That on, to wit, August 21, 1939, Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line, defendant, then and there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and foreign commerce by motor vehicle on public highways including those between the points hereinafter set forth, for compensation, unlawfully did knowingly and wilfully engage in an interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Denver, Colorado, to Fort Collins, State and District of Colorado and within the jurisdiction of this Court, certain property, to wit, 1 box each of firearms, iron bolts, electric supplies, hand tools, leather goods, clothes filter, emery wheels, 2 boxes belt dressing, 3 boxes iron vise, 2 boxes enameled ware, 4 coils of rope, 3 boxes sheet iron tubes, 2 boxes grinders, 2 boxes wood handles, and 1 bundle of saws, of an aggregate weight of, to wit, 778 pounds, for compensation, to wit, $3.93, which said property was then and there

moving in interstate commerce in the course of through transportation from Hibbard, Spencer, Bartlett and Company, Chicago, Illinois, consignor, to Toliver and Kinney Mercantile Company, at said Fort Collins, then and there without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Section 306 (a), Title 49, U. S. Code.)

Count 12

That on, to wit, August 7, 1939, Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line, defendant, then and there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and foreign commerce by motor vehicle on public highways, including those between the points hereinafter set forth, for compensation, unlawfully did knowingly and wilfully engage in an interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Denver, Colorado, to Fort Collins, State and District of Colorado and within the jurisdiction of this Court, certain property, to wit, 1 box each electric appliances, breast drills, can openers, belt dressing, hand tools, iron washers, bottle cappers, corn knives, friction tape, calf weaners, stovepipe elbows, 2 boxes sweat pads, 2 boxes wire baskets, 4 boxes of tinware, 2 boxes aluminum articles, 2 boxes electric dry-cell batteries, 3 boxes electric lamps, and 3 boxes oil stoves, of an aggregate weight of, to wit, 540 pounds, for compensation, to wit, $2.99, which said property was then and there moving in interstate commerce in the course of through transportaion from Hibbard, Spencer, Bartlett and Company, Chicago, Illinois, consignor, to Toliver and Kinney Mercantile Company, at said Fort Collins, then and there without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.) Section 306 (a), Title 49, U. S. Code.)

Count 13

That on, to whit, July 20, 1939, Leamon Resler doing business as Resler Truck Line and as Brady Truck Line, defendant, then and

there being a common carrier by motor vehicle engaged in the transportation of property for the general public in interstate and foreign commerce by motor vehicle on public highways including those between the points hereinafter set forth, for compensation, unlawfully did knowingly and wilfully engage in an interstate operation on a public highway, in that he did transport by motor vehicle on public highways from Stratton, Nebraska, to a point seven miles from Loveland, State and District of Colorado, and within the jurisdiction of this Court, certain property, to wit, one 8-foot basin tiller and one bundle of 14 discs for one George A. Walker, for compensation, to wit, $2.37, then and there without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (Section 306 (a), Title 49, U. S. Code.)

THOMAS J. MORRISSEY,
U. S. Attorney.

13 VERIFICATION

STATE OF COLORADO,
County of Denver, ss:

William F. Goodman, being first duly sworn upon his oath deposes and says:

That he is an employee of the United States Government, to wit, a Special Agent of the Bureau of Motor Carriers of the Interstate Commerce Commission; that in the course of his duties as such Special Agent he made investigation of the matters set forth in the above and foregoing Information against Leamon Resler, doing business as Resler Truck Line and as Brady Truck Line; that he has read the above and foregoing Information and knows the contents thereof, and the matters therein set forth are true of his own knowledge.

WILLIAM F. GOODMAN.

Subscribed and sworn to before me this 11th day of July 1940. My commission expires February 24, 1941.

[NOTARIAL SEAL] LUCILLE RIEDE MONTGOMERY,
Notary Public.

14 In United States District Court for the District of Colorado

[Title omitted.]

Motion to quash information

Filed August 23, 1940.

Comes now the defendant in the above entitled matter by his attorney, Marion F. Jones, and moves to quash the information heretofore filed in the above entitled matter, relying upon the following facts and circumstances:

I

That on April 11, 1939, defendant transmitted to the Interstate Commerce Commission, Washington, D. C., an application, in due and regular form, executed in compliance with the rules and regulations of the Interstate Commerce Commission, to transfer to himself the operating rights under MC 61610 from C. J. Brady, doing business as Brady Truck Lines, which operating rights included the right to engage in interstate commerce between Denver, Colorado, and Fort Collins, Colorado; that said application was on file with the Interstate Commerce Commission during all the periods covered by said information; that on April 11, 1939, and thereafter during all periods covered by said information, defendant neither owned nor operated twenty (20) motor vehicles, and in said transfer not more than twenty (20) motor vehicles, as defined by Section 213 (e) of the Motor Carrier Act, 1935, as amended, were involved.

II

That defendant having acquired the rights of C. J. Brady
15 to operate in interstate commerce between Denver, Colorado, and Fort Collins, Colorado, was not in violation of Section 206 (a) of the Motor Carrier Act, 1935, as amended; that the Interstate Commerce Commission is without jurisdiction, under the provisions of Section 213 (e), to approve or disapprove a transfer where the total number of motor vehicles involved is not more than twenty (20).

MARION F. JONES,
Marion F. Jones,
Attorney for Defendant.

526 DENHAM BUILDING, DENVER, COLORADO,
August 19, 1940.

In United States District Court for the District of Colorado

9197

THE UNITED STATES OF AMERICA

vs.

LEAMON RESLER, DOING BUSINESS AS RESLER TRUCK LINE AND AS BRADY TRUCK LINE

Order granting motion to quash

Sept. 20, 1940

At this day comes Joseph N. Lilly, Esquire, Assistant District Attorney, and the defendant by Marion F. Jones, Esquire, his attorney, also comes. And the motion of the defendant to quash the information herein coming on now to be heard, is argued by counsel, and the court having considered the same and being now fully advised in the premises;

It is ordered by the court, for good and sufficient reasons
16 to the court appearing, that the said motion be, and the same is hereby granted as to counts one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve of the information herein.

In United States District Court for the District of Colorado

[Title omitted.]

Petition for appeal

Filed October 18, 1940

To the Honorable J. FOSTER SYMES, Judge of said Court:

Now comes your petitioner, United States of America, plaintiff in the above entitled cause, by Thomas J. Morrissey, its attorney, and shows the Court that heretofore, on, to wit, September 20, 1940, this Court, after the defendant had filed a motion to quash all counts of the information filed herein, and thereafter and before argument thereon orally amended such motion limiting the applicability thereof to the first twelve counts of the information, and after argument thereon entered an order granting said motion of the defendant as to the first twelve counts of the information; that said motion of the defendant was a special plea in bar of the causes of action set out in the first twelve counts of the information and of further prosecution under the said counts

of the information herein, whereby, and by reason whereof, a decision, sustaining the said special plea in bar of said first twelve counts of the information, was rendered by the Court
17 herein, and your petitioner further shows to the Court that said defendant has not been by the said decision of said Court, and has not been, by the said proceedings in said Court, put in jeopardy, all of which will more fully appear from the record of this cause in the office of the Clerk of this Court.

Your petitioner, therefore, represents that the action taken by said Court, in granting said motion to quash the first twelve counts of the information, is error, and is not supported by the record in said cause and proceedings, and that manifest and prejudicial error has intervened to the damage of your petitioner by reason thereof, as will more fully appear in the within assignment of errors which is presented and filed herewith, and considered a part thereof.

Wherefore, and to the end that said errors may be corrected, your petitioner prays an appeal in said cause from the District Court of the United States for the District of Colorado to the Supreme Court of the United States as by law provided; that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents, upon which said action was taken by said Court, duly authenticated, be sent to the said Supreme Court of the United States, under the rules of said Court in such cases made and provided.

Your petitioner further prays that pursuant to statute in such case made and provided no bond or surety be required of it.

THOMAS J. MORRISSEY,
United States Attorney for the District of Colorado,
Attorney for the United States of America, Plaintiff.

OCT. 18, 1940.

18 In United States District Court for the District of Colorado

[Title omitted.]

Order allowing appeal

Filed October 18, 1940

Now on this 18th day of October, there is presented to the Court the petition of the plaintiff, United States of America, praying for an appeal herein to the Supreme Court of the United States, and it appearing to the Court that there has been filed with said

petition for appeal an assignment of errors, setting forth separately and particularly each error asserted and intended to be urged.

It is therefore ordered by the Court that an appeal be, and the same is, hereby allowed said plaintiff, United States of America, as provided by law, to the Supreme Court of the United States, to review the decision, proceedings and action taken by the Court in this case, wherein the Court granted the special plea of the defendant, denominated a motion to quash, which said motion was orally amended by the defendant before argument thereon so as to limit its applicability only to the first twelve counts of the information; that citation issue as provided by law; that a full transcript of the proceedings in this case be, by the Clerk of this Court, presented and filed with the Clerk of the Supreme Court of the United States, and that pursuant to statute, in such case made and provided, no supersedeas bond, or cost bond, or surety for the same, need be filed herein by said plaintiff,
19 United States of America.

Dated at Denver, Colorado, this 18 day of October 1940.

J. FOSTER SYMES,
Judge of the United States,
District Court for the District of Colorado.

In United States District Court for the District of Colorado

[Title omitted.]

Assignment or errors

Filed October 18, 1940

Now comes the United States of America, plaintiff above named, by Thomas J. Morrissey, United States Attorney, in and for the District of Colorado, its attorney, and having heretofore filed its petition for appeal herein, says that in the record and proceedings, and in the action taken by said Court, in granting the special plea of the defendant, denominated a motion to quash, which said motion was orally amended before argument so as to limit its applicability only to the first twelve counts of the information filed herein, there has intervened manifest and prejudicial error, to the prejudice of the plaintiff, United States of America, in the above entitled cause.

The said errors so intervening are enumerated as follows, to wit:

20 1. The Court erred in granting the special plea in bar, denominated a motion to quash, filed by the defendant herein.

2. In construing section 213 (e) of the Motor Carrier Act, 1935, as amended (49 U. S. Code Sec. 313 (e)), as applicable to Section 212 (b) of said Act (49 U. S. Code Sec. 312 (b)).

3. In failing to apply Rule 1 (d) of the rules and regulations promulgated by the Interstate Commerce Commission July 1, 1938, effective September 1, 1938, governing transfers of rights to operate as a motor carrier in interstate or foreign commerce.

4. In the construction of section 213 of the Motor Carrier Act, 1935, as amended (49 U. S. Code Sec. 313).

5. In the construction of section 212 (b) of the Motor Carrier Act, 1935, as amended (49 U. S. Code Sec. 312 (b)).

Wherefore, the plaintiff, United States of America, respectfully prays that the action taken by said Court, in granting said special plea, denominated a motion to quash, filed herein by the defendant, be set aside, and held for naught.

THOMAS J. MORRISSEY,
United States Attorney for the District of Colorado,
Attorney for the United States of America, Plaintiff.

OCT. 18, 1940.

29 In United States District Court for the District of Colorado

[Title omitted.]

Stipulation as to admission of certain facts

Filed Nov. 4, 1940

It is hereby stipulated and agreed by and between the parties hereto that for the purposes of the appeal which has been allowed herein to the Supreme Court of the United States and advising such Court of certain admissions made in open Court by the parties hereto upon the argument of the defendant's motion to quash,

1. That the defendant's motion to quash was orally amended at the hearing upon said motion so that the same became applicable only to the first twelve counts of the information.

2. That the defendant on, to wit, April 14, 1939, filed an application with the Interstate Commerce Commission for authority

to transfer to himself the operating rights held by C. J. Brady under docket number MC 61610, and that such application was on file with the Interstate Commerce Commission during all the periods covered by the information, but that such application to transfer had never been approved by said Commission.

3. That not more than twenty vehicles were involved in such transfer.

Denver, Colorado, November 4, 1940.

THOMAS J. MORRISSEY,
Attorney for Plaintiff.
MARION F. JONES,
Attorney for Defendant.

30 In United States District Court for the District of Colorado

[Title omitted.]

Docket entries

July 25, 1940—Order: Leave to file information. 83/165.
" " " —Information.
Aug. 23, 1940—Motion to quash information.
Sept. 20, 1940—Order: Motion to quash information sustained as to first 12 counts. 83/385.
Oct. 11, 1940—Praecipe—3 certified copies. 83/385 to U. S. Atty.
" 18, " —Petition for appeal to Supreme Court.
" " " —Order allowing appeal. 83/553.
" " " —Statement of jurisdiction.
" " " —Assignment of errors.
" " " —Citation issued—Ret 60 days and to Marshal.
" 19, " —Marshals affidavit of service of copy of petition—Order allowing appeal—assignments of error—copy of statement and original statement directing attention to Paragraph 3, Rule 12, of Supreme Court Rules.
" " " —Marshals return service citation at Denver 10/19/40.
" " " —Marshals return copy directing attention to paragraph 3, Rule 12, SCR at Denver 10/19/40.
" 25, " —4 copies of 83/385—one certified—to U. S. Atty.
Nov. 4, " —Stipulation re certain admissions.
" " " —Praecipe for transcript of record.

31 In United States District Court for the District of Colorado

[Title omitted.]

Praecipe for transcript of record

Filed Nov. 4, 1940

It is hereby stipulated and agreed by and between the parties hereto that for the purposes of the appeal which has been allowed herein to the Supreme Court of the United States, the clerk of this Court is requested to prepare and forward to the clerk of the Supreme Court of the United States a transcript of the record on appeal which shall include only the following portions of the record:

1. Information.
2. Defendant's motion to quash.
3. Order sustaining defendant's motion to quash.
4. Petition for allowance of an appeal, and order allowing same.
5. Assignment of errors.
6. Statement of jurisdiction.
7. Citation to defendant and affidavit of service thereof upon defendant.
8. Statement calling attention of defendant to the provisions of paragraph 3 of rule 12 of the United States Supreme Court, and affidavit of service thereof.
9. Affidavit of service upon the defendant of copy of petition for allowance of appeal, copy of order allowing appeal, copy of assignment of errors, copy of statement of jurisdiction, and original statement directing attention to the provisions of paragraph 3, rule 12 of the rules of the United States Supreme Court.
10. Stipulation dated November 4, 1940.
11. Docket entries.
12. This praecipe.

Denver, Colorado, November 4, 1940.

THOMAS J. MORRISSEY,
Attorney for Plaintiff.
MARION F. JONES,
Attorney for Defendant.

33 [Citation in usual form showing service on Leamon Resler omitting in printing.]

34 [Clerk's certificate to foregoing transcript omitted in printing.]

35 In United States District Court for the District of Colorado

[Title omitted.]

Supplemental stipulation

Filed Nov. 20, 1940

It is hereby stipulated and agreed by and between the parties hereto that for the purposes of the appeal which has been allowed herein to the Supreme Court of the United States and advising such Court of certain facts admitted to be true,

1. That the application filed by the defendant on, to wit, April 14, 1939, with the Interstate Commerce Commission, for authority to transfer to himself the operating rights held by C. J. Brady under docket number MC 61610, referred to in paragraph 2 of a stipulation between the parties hereto, filed with the Clerk of this Court on November 4, 1940, was dismissed by said Commission on October 17, 1939, at the instance and request of the applicant, the defendant herein.

2. That this supplemental stipulation be filed with the Clerk of the United States District Court for the District of Colorado, and that the Clerk thereof include the same as part of the record on appeal in this case.

Denver, Colorado, November 20, 1940.

THOMAS J. MORRISSEY,
Attorney for Plaintiff.
MARION F. JONES,
Attorney for Defendant.

36 Supreme Court of the United States

[Title omitted.]

Statement of points to be relied upon and designation of record for printing

Filed Dec. 10, 1940

I

Pursuant to Rule 13 of this Court, the United States of America, appellant, states that in its brief and oral argument on its appeal in the above entitled cause it will rely upon the points hereinbelow stated:

(1) The District Court erroneously sustained the plea in bar, denominated a motion to quash, filed and urged by the defendant.

(2) The Court erroneously failed to overrule and dismiss the said plea in bar.

(3) The Court erred in holding and adjudging that there was in force with respect to the defendant Resler a certificate of public convenience and necessity or its equivalent authorizing him to engage in interstate operations on the public highways between Denver and Fort Collins, both in the State of Colorado, as a common carrier by motor vehicle.

(4) The Court erred in holding and adjudging that the transfer to defendant Resler of the interstate operating rights held by Brady by virtue of an order of the Interstate Commerce
37 Commission dated March 17, 1938 (entered in its Docket No. MC-61610), authorizing him to operate as a common carrier by motor vehicle on the public highways between said Denver and Fort Collins was effective, and that said rights and order were in force with respect to the defendant Resler, without the approval of the Interstate Commerce Commission.

(5) The Court erred in holding and adjudging that the Interstate Commerce Commission had no authority under section 212 (b) of the Motor Carrier Act, 1935, or otherwise, to require by its rules and regulations approval by the Commission for transfer of such operating rights from Brady, a common carrier by motor vehicle, to the defendant Resler, a common carrier by motor vehicle.

(6) The Court erred in holding and adjudging that the provisions of section 213 (e) of the said act are applicable to transfers of certificates, permits, and operating rights otherwise evidenced and recognized by said act, from one motor carrier to another where less than 21 vehicles are involved.

(7) The Court erred in holding and adjudging that such transfers in such cases are not subject to the provisions of section 212 (b) of the act insofar as approval for such transfers by the Interstate Commerce Commission is concerned.

(8) The Court erred in holding and adjudging that the "Rules and Regulations Governing Transfers of Rights to Operate as a Motor Carrier in Interstate or Foreign Commerce" adopted by the Interstate Commerce Commission on the first day of July, 1938, effective September 1, 1938, were not applicable and could not lawfully be applied to the transfer to defendant Resler of the operating rights granted by the Interstate Commerce Commission to the said Brady by its said Order of March 17, 1938.

II

United States of America, appellant, states that in its brief and oral argument on its appeal in the above entitled cause it

38 will rely upon the points stated in its assignment of errors therein in addition to the points above enumerated.

III

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

December 7, 1940.

FRANCIS BIDDLE,
Solicitor General.

Service on December 2nd, 1940, of a copy of the above Statement of Points and Designation of Record to be Printed is hereby acknowledged.

MARION F. JONES,
Counsel for Appellee.

[Endorsement on cover:] File No. 44965. Colorado, D. C. U. S. Term No. 616. The United States of America, Appellant vs. Leamon Resler and Leamon Resler, Doing Business as Resler Truck Line and as Brady Truck Line. Filed December 10, 1940. Term No. 616 O. T. 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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In the District Court of the United States for the District of Colorado

Criminal 9197—Filed Oct. 18, 1940, George A. H. Fraser, Clerk

UNITED STATES OF AMERICA, PLAINTIFF

v.

LEAMON RESLER, DOING BUSINESS AS RESLER TRUCK LINE AND AS BRADY TRUCK LINE, DEFENDANT

No. 9197 Cr.

STATEMENT OF JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, plaintiff submits herewith its statement showing the basis of the jurisdiction of the said Supreme Court in the above-entitled cause.

I

The statutory jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment here complained of is conferred by the Act of March 2, 1907, C. 2564, 34 Stat. 1246 (U. S. C. Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925.

II

The date of the decision complained of is September 20, 1940, and the date of the Application for Appeal is October 18, 1940.

III

On July 25, 1940, a criminal information containing thirteen counts was filed in the United States District Court for the District of Colorado, the first twelve counts of which charged that at various times between April 15, 1939, and August 28, 1939, the defendant Leamon Resler, doing business as Resler Truck Line and as the Brady Truck Line, unlawfully did knowingly and wilfully engage in interstate operation as a common carrier by motor vehicle by transporting for hire certain property then moving in interstate commerce, from Denver to Fort Collins, Colorado, without there being then and there in force with respect to said defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations, contrary to the statute in such case made and provided, to wit: Sec. 206 (a) Motor Carrier Act, 1935, as amended (49 U. S. Code, Sec. 306 (a)). The thirteenth count of the information related to an alleged violation over another highway route.

The defendant voluntarily appeared and filed an unverified motion to quash the information, alleging therein that the defendant had, on April 11,

1939, filed with the Interstate Commerce Commission an application to transfer to himself the operating rights of one C. J. Brady, doing business as Brady Truck Line, which had been issued to the said Brady by the Interstate Commerce Commission upon the application of said Brady bearing docket number MC 61610 in the files of said Commission, which rights included the right to engage in interstate commerce by motor vehicle between Denver and Fort Collins, Colorado; that defendant's application for the transfer to himself of the said Brady's right was on file with the Interstate Commerce Commission during all the periods covered by the informations; that at all such times the defendant neither owned nor operated twenty motor vehicles, and that not more than twenty motor vehicles, as defined by Section 213 (e) of the Motor Carrier Act, 1935, as amended (49 U. S. Code, Sec. 313 (e)), were involved in the aforesaid transfer; and that the defendant, having acquired the rights of the said Brady to operate in interstate commerce between Denver and Fort Collins, Colorado, had not operated in violation of Section 206 (a) of the Motor Carrier Act, 1935, as amended (Title 49, U. S. C., Section 306 (a)) since the Interstate Commerce Commission was without jurisdiction under the provisions of Section 213 (e) (Title 49, U. S. C., Section 313 (e)) either to approve or disapprove such a transfer where the total

number of vehicles involved was not more than twenty.

The motion to quash raised no question as to the sufficiency of any count of the information. Upon oral argument counsel for defendant stated that the motion was limited to the first twelve counts of the information, and it was so considered by the District Court.

After argument, the District Court on September 20, 1940, granted the motion to quash, as limited to the first twelve counts, but rendered no written opinion. The decision prevents any further prosecution of the defendant upon counts one (1) to twelve (12), inclusive, and, therefore, is a decision sustaining a special plea in bar when the defendant has not been put in jeopardy.

IV

The sole question involved is whether the Interstate Commerce Commission has or has not jurisdiction over transfers of operating rights from one motor-vehicle carrier to another when the total number of vehicles involved in the transaction is not more than twenty.

Section 212 (b) of the Motor Carrier Act reads as follows:

> Except as provided in Section 213, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

Under the authority conferred by the foregoing section the Interstate Commerce Commission on July 1, 1938, promulgated rules and regulations governing the transfer of operating rights. Rule 1 defined generally the terms employed. Rule 2 (a) provided that applications for the transfer of operating rights should be in writing, should be verified, and should contain the information prescribed by the Commission. Rule 2 (b) provided for service upon certain interested governmental agencies. Rule 2 (c) provided as follows:

> The transfer described in any such application shall be approved if it appears from the application or from any hearing held thereon or from any investigation thereof that the proposed transaction is one which is not subject to the provisions of section 213 of the Motor Carrier Act, 1935, and that the proposed transferee is fit, willing, and able properly to perform the service authorized by the operating rights sought to be transferred, and to conform to the provisions of the Motor Carrier Act, 1935, and the requirements, rules, and regulations of the Commission thereunder. Otherwise the application shall be denied.

Section 213 covers in greater detail the subject of consolidation, merger, and acquisition of control. It provides for formal application for approval of consolidations, etc.; for notice to the Governor of each State in which the properties or

operations of the carriers affected are situated; for formal hearings; and for formal findings and order. Subsection (e) of section 213 provides, however:

> Except where a carrier other than a motor carrier is an applicant or any person which is controlled by such a carrier or carriers by railroad or affiliated therewith within the meaning of section 5 (8) of part I, the provisions of this section requiring authority from the Commission for consolidation, merger, purchase, lease, operating contract, or acquisition of control shall not apply where the total number of vehicles involved is not more than twenty.

The decision of the District Court complained of involves an interpretation of the two foregoing sections. The Court has held that since section 212 (b) commences "Except as provided in section 213 * * *," there must be read into section 212 (b) the provision of Section 213 (e) which exempts transactions involving twenty or less vehicles. This construction is contrary to the obvious intent of the two sections. Section 213 prescribes formal proceedings for any consolidation, merger, or acquisition of control broad enough to involve more than twenty vehicles. Section 212 (b) is plainly designed to cover any transfers of control which are not within the scope of section 213.

The construction of the Act which the District Court has adopted is plainly contrary to the declaration of policy expressed by Congress in section 202 (a) of the Motor Carrier Act, namely, to foster sound economic conditions in the motor-carrier industry and among motor carriers. The Commission clearly has the power to consider the financial fitness to operate of an applicant for a certificate of public convenience and necessity; and the number of vehicles involved is immaterial upon an original application for a certificate.

If the judgment of the District Court were allowed to stand, the Interstate Commerce Commission would be deprived of jurisdiction over all transfers of certificates between motor carriers where the number of vehicles involved was less than twenty. While the Commission could safeguard the public interest by investigating the fitness of the original applicant for a certificate, it would be powerless to prevent a transfer of the certificate to an unfit person. The United States contends that the foregoing considerations show that the question involved is substantial and that the decision of the District Court should be reviewed.

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INDEX

CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 616

THE UNITED STATES OF AMERICA, APPELLANT

v.

LEAMON RESLER, AND LEAMON RESLER DOING BUSINESS AS RESLER TRUCK LINE AND AS BRADY TRUCK LINE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court filed no written opinion.

JURISDICTION

The order of the District Court sustaining the motion to quash the information was entered September 20, 1940 (R. 11). The appeal to this Court was applied for and allowed on October 18, 1940 (R. 11–13). The jurisdiction of this Court to review by direct appeal the judgment here complained of is conferred by the Act of March 2, 1907,

c. 2564, 34 Stat. 1246 (18 U. S. C., Sec. 682), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 345). An order was entered by this Court on January 6, 1941, noting probable jurisdiction.

STATUTE INVOLVED

The statute involved is the Motor Carrier Act, 1935 (c. 498, 49 Stat. 543–567, 49 U. S. C. Supp. V, Secs. 301–327). The pertinent provisions are contained in Sections 212 and 213, which are set forth in Appendix A, *infra*, pp. 19–24.

QUESTION PRESENTED

Whether the transfer of a certificate of public convenience and necessity issued under the Motor Carrier Act, 1935, is subject to the conditions specified in Section 212 (b) of that statute unqualified by Section 213 (e), where less than 20 vehicles are involved.

STATEMENT

On July 25, 1940, an information in 13 counts was filed against appellee in the United States District Court for the District of Colorado (R. 1–9). The first 12 counts charged that at various times between April 15, 1939, and August 28, 1939, appellee, doing business as Resler Truck Line and as Brady Truck Line, unlawfully engaged in interstate operation as a common carrier by motor vehicle by transporting for hire, from Denver to Fort Collins, Colorado, property then moving in inter-

state commerce, without having secured from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing such interstate operation, in violation of Section 206 (a) of the Motor Carrier Act, 1935, as amended (49 U. S. C. Supp. V, Sec. 306 (a)). The 13th count of the information related to an alleged violation over another highway route and is not involved on this appeal.

Appellee appeared and filed an unverified pleading denominated "Motion to quash information" (R. 10), which recited the following facts: On April 11, 1939, "in compliance with the rules and regulations of the Interstate Commerce Commission,"[1] appellee transmitted to the Commission an application to transfer to himself the operating rights of one C. J. Brady, doing business as Brady Truck Line, which the Commission had theretofore issued to the said Brady and which included authorization to engage in interstate commerce between Denver and Fort Collins, Colorado. That application was on file with the Commission during the period covered by the information.[2] Throughout that period appellee neither owned nor operated twenty motor vehicles, and there were involved in the transfer not more than twenty motor vehicles,

[1] These rules are set forth in Appendix B, *infra*, pp. 24–30.

[2] By stipulations it appears that appellee's application was filed with the Commission on April 14, 1939; that it was never approved by the Commission; and that it was dismissed by the Commission on October 17, 1939, at appellee's request (R. 14–15, 17).

as defined by Section 213 (e) of the Motor Carrier Act. Appellee's defense, predicated on the foregoing facts, was (R. 10):

> That defendant having acquired the rights of C. J. Brady to operate in interstate commerce between Denver, Colorado, and Fort Collins, Colorado, was not in violation of Section 206 (a) of the Motor Carrier Act, 1935, as amended; that the Interstate Commerce Commission is without jurisdiction, under the provisions of Section 213 (e), to approve or disapprove a transfer where the total number of motor vehicles involved is not more than twenty (20).

The motion to quash raised no question as to the sufficiency of the information as a pleading, and at the argument was orally amended so as to apply only to the first twelve counts of the information (R. 13, 14). On September 20, 1940, the District Court, after argument, granted, as to counts one to twelve, inclusive, of the information, appellee's so-called motion to quash. On October 18, 1940, an appeal was allowed to this Court (R. 12-13).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In granting the special plea in bar, denominated a motion to quash, filed by appellee.

2. In holding that there was in force with respect to appellee a certificate of public convenience and necessity, or its equivalent, authorizing him to engage in interstate operations on the public highways

between Denver and Fort Collins, Colorado, as a common carrier by motor vehicle:.

3. In holding that the provisions of Section 213 (e) of the Act exempt from the provisions of Section 212 (b) of the Act transfers of certificates of public convenience and necessity where not more than 20 vehicles are involved.

4. In failing to apply the rules and regulations promulgated by the Interstate Commerce Commission July 1, 1938, effective September 1, 1938, under Section 212 (b) of the Act and covering transfers of rights to operate as a motor carrier in interstate and foreign commerce.

SUMMARY OF ARGUMENT

Sections 212 (b) and 213 of the Motor Carrier Act, 1935, together constitute a comprehensive scheme for the regulation of transfers of certificates of public convenience and necessity. The basic provisions are contained in Section 212 (b) which permits the transfer of any certificate in accordance with such rules and regulations as the Commission may prescribe. In the case of mergers or similar combinations, the right to transfer a certificate conferred by Section 212 (b) is subject to further and more exacting conditions set forth in detail in Section 213. But Section 213 (e) removes from its scope transfers involving 20 vehicles or less. Accordingly, such transfers remain subject to the general provisions of Section 212 (b), unaffected by the more detailed requirements of Section 213.

The interpretation of the statute urged by the appellee ignores the comprehensive scheme of regulation which is established by Sections 212 and 213, and would seriously impede the effective administration of the law by the Commission. Although the Commission can and does exact compliance with various conditions prior to the granting of a certificate of public convenience and necessity in the first instance, its efforts could be nullified by a transfer of the certificate unless the transfer were subject to its approval.

ARGUMENT

THE DISTRICT COURT, IN SUSTAINING APPELLEE'S MOTION TO QUASH THE INFORMATION, ERRONEOUSLY CONSTRUED SECTION 213 (e) AS MODIFYING SECTION 212 (b) OF THE MOTOR CARRIER ACT, 1935

This is a case of first impression presenting for decision a question of importance in the administration of the Motor Carrier Act.[3] No factual issues or procedural questions[4] are presented.

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[3] The same question will arise under the Transportation Act of 1940. Section 213 of the Motor Carrier Act was repealed by the new Act but the provisions involved on this appeal were reenacted in Section 7 of the latter law.

[4] The Government raised no objection to the fact that appellee's pleading was denominated a motion to quash when, actually, it was a special plea in bar, and the district judge treated it as such (R. 12–13).

The sole problem is whether, as a matter of law, the court below correctly construed Sections 212 (b) and 213 (e) of the Act.

The Motor Carrier Act establishes a comprehensive scheme for the regulation of all interstate common carriers by motor vehicle under the administration of the Interstate Commerce Commission. Regulation is initiated and made effective by the familiar and traditional method of requiring all such carriers to secure from the Commission a certificate of public convenience and necessity as a condition of engaging in business (Sec. 206 (a)). Criminal penalties are imposed for operation without a certificate (Sec. 222).

In this case the gist of the offense charged was operation as a common carrier without a certificate. The court sustained the so-called motion to quash in which the appellee relied solely upon the contention that he had obtained a certificate by a transfer which, under Section 213 (e), was not subject to approval by the Commission. Since appellee did not contend that he had either acquired a certificate from the Commission or secured one by transfer approved by it, the court must have concluded that under Section 213 (e) the appellee could validly acquire a certificate by transfer without obtaining the approval of the Commission. This construction completely fails to give effect to the obvious purpose of Section 212 (b).

A. TRANSFERS OF CERTIFICATES ARE AUTHORIZED ONLY BY SECTION 212 (B) AND MUST BE MADE EITHER PURSUANT TO THE PROCEDURE THEREIN PRESCRIBED OR IN ACCORDANCE WITH THE PROCEDURE PROVIDED IN 213

Section 212 of the Act defines the Commission's powers with respect to existing certificates. Section 212 (a) is a complete and self-contained description of the only authority granted in the Act to the Commission to alter, amend, or revoke any certificate. It gives the Commission discretionary power to amend any certificate on application of the holder and also authorizes the Commission to suspend, change, or revoke a certificate of any holder who willfully fails to comply with the Act, the rules and regulations promulgated thereunder, or the terms and conditions of the certificate. Section 212 (b) is a general grant to the Commission of authority to prescribe conditions under which certificates may be transferred and is the sole source of any right to transfer such certificates. It provides that—

> Except as provided in section 213, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

Section 212 thus discloses a clear and unequivocal intent to vest in the Commission complete regulatory jurisdiction over the suspension, revocation, amendment, and transfer of certificates. Para-

graph (b) of that section requires all transfers to be made in conformity with such rules and regulations as the Commission may prescribe except in so far as a different procedure for accomplishing the transfer is prescribed in Section 213.[5]

No claim is made that the transfer here involved was subject to the procedure prescribed in Section 213. Paragraph (a) of that section prohibits

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[5] Appellee, in his motion to quash, did not contend that he had complied with Section 212 (b) or with the rules and regulations issued under it. It appears that the appellee filed an application for a transfer with the Commission, that the application was pending during the period of time covered by the information (R. 14–15), but that the application was withdrawn at the request of appellee (R. 17). If this was an attempt to comply with the rules and regulations of the Commission regarding transfer under Section 212 (b), it was a failure, since regulation 1 (d) of the Rules and Regulations promulgated by the Interstate Commerce Commission covering transfer of rights to operate as a motor carrier in interstate or foreign commerce expressly provides "No attempted transfer of any operating right shall be effective except upon full compliance with these rules and regulations and until after the Interstate Commerce Commission has approved such transfer as herein provided (except as provided in Rule 7 (a))." Rule 7 (a) has no application to the present case because it merely permits transfer of intrastate certificates where the approval of the appropriate state authority has been secured and notice given to the Interstate Commerce Commission. It is not disputed in this case that the Commission has never given approval to the transfer here in question (R. 14–15).

The Commission's Rules and Regulations were published in the Federal Register, Vol. III, No. 173, pp. 2157–2158, September 3, 1938, and Vol. III, No. 174, p. 2180, September 7, 1938.

mergers, consolidations, or acquisitions of control which bring the businesses of two motor carriers, or the business of a motor carrier and a carrier by rail, express, or water under a single control unless approved by the Commission. It establishes the procedure to be followed in securing the Commission's approval. The Commission must hold a formal hearing after notice has been given to all interested parties, including the Governor of each state in which any of the operations of the carriers involved occur. Approval may be granted only if the Commission finds that the proposed transaction will be consistent with the public interest. Paragraphs (b), (c), and (d) are designed to implement and make effective the Commission's authority. The only combinations or acquisitions permitted without compliance with the procedure and conditions prescribed are those involving not more than 20 vehicles. This exemption is contained in paragraph (e) which provides as follows:

> Except where a carrier other than a motor carrier is an applicant or any person which is controlled by such a carrier or carriers by railroad or affiliated therewith within the meaning of section 5 (8) of part I, the provisions of this section requiring authority from the Commission for consolidation, merger, purchase, lease, operating contract, or acquisition of control shall not apply where the total number of motor vehicles involved is not more than twenty.

Section 213 is not an affirmative authorization for the transfer of certificates. It merely prescribes the procedure which must be followed in securing the Commission's approval for certain transactions. To the extent that any transfer is not governed by the procedure prescribed by Section 213, it remains subject to the basic provisions in Section 212 (b). And since Section 213 (e) eliminates transfers involving 20 vehicles or less from the scope of Section 213, such transfers obviously remain subject to Section 212 (b), unaffected by Section 213.

Subsection (e) of Section 213 is nothing more than an explicit direction that the Commission shall not consider mergers or combinations of two or more motor carriers, which involve 20 vehicles or less, as being included in the classes of transactions dealt with by Section 213. Exactly the same result could have been achieved by affirmatively defining each type of transaction which could be consummated only with the Commission's approval secured in the manner prescribed in Section 213 (a). If Congress had employed that cumbersome method of draftsmanship, this controversy would not have arisen. That it chose instead to adopt a simpler form of definition does not alter the purpose sought to be accomplished.

Obviously, that purpose was to permit the Commission, in exercise of the discretion vested in it by Section 212 (b), to relieve small trucking con-

cerns of the expense and difficulty of securing administrative approval through the more exacting procedure established by Section 213, and to relieve the Commission of the burden of hearing proceedings in respect to every transfer, however small the number of vehicles affected and however insignificant the effect upon the general transportation system. All other transactions were deemed by Congress to be sufficiently important from the standpoint of protecting the public against transportation monopolies and of assuring adequate competition, to require that Commission approval be granted only after affording all interested parties including representatives of the public an opportunity to be heard.*

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*In explaining Section 213 on the floor of the Senate, Senator Wheeler, Chairman of the Senate Committee which reported out the bill, said (79 Cong. Rec. 5654–5655):

"Section 213, page 35. Consolidation, merger, and acquisition of control: At present most truck operations are small enterprises. However, there are many rumors of plans for the merging of existing operations into sizeable systems. In view of past experiences with railroad and public utility unifications, it is regarded as necessary that the Commission have control over such developments, *where the number of vehicles is sufficient to make the matter one of more than local importance.* This section, therefore, confers on the Commission jurisdiction over all consolidations, mergers, purchases, leases, operating agreements, and acquisitions of control through stock ownership where two or more motor carriers are involved or where a person other than a motor carrier undertakes to acquire control through stock ownership of two or more motor carriers, and prohibits all other forms of unification. An amendment made by the committee makes this jurisdiction applicable, except in the case of

From the foregoing discussion, it is apparent that Section 212 (b) and Section 213 deal with separate and distinct problems. Section 212 (b) is a regulatory provision designed to vest in the Commission control over any change in the status of a certificate of public convenience and necessity. In contrast, Section 213 is designed to safeguard the public against monopolistic control by requiring the Commission to expose proposed mergers to the light of public hearings. By introducing Section 212 (b) with the phrase "Except as provided in Section 213," Congress has not evinced an intent to exclude certain transfers of certificates from regulation by the Commission. Instead, Congress has obviated the possibility of Section 212 (b) be-

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rail, express, or water carrier affiliations, only where the total number of vehicles involved is more than 20 (subpar. (e), p. 39.)

"In other words, we eliminated from this provision such a case, for example, as that of two small operators who might want to get together and we made it apply only to cases where they had more than 20 vehicles, so that the small operators could get together without the necessity of going through a great deal of red tape with the Commission" (Italics supplied).

Mr. Sadowski, a member of the subcommittee which considered the Motor Carrier Act in the House, stated on the floor (79 Cong. Rec. 12206):

"I will say in this respect that it is the intent, and it is important to the welfare and progress of the motor-carrier industry that the acquisition of control of the carriers be regulated by the Commission so that the control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation."

ing construed in a manner which would defeat the purpose of Section 213 by affirmatively declaring that no transaction governed by Section 213 may be consummated in the less formal method prescribed in Section 212 (b). But in making certain that Section 213 would not be misconstrued, there is no evidence that Congress intended to create an hiatus in the Commission's jurisdiction over transfers of certificates. Thus the rigorous procedure required by Section 213 (a) covers a limited class of transfers while all others are governed by the regulations of the Commission promulgated under Section 212 (b). Consequently, transactions, such as those described in Section 213 (e), which are not required to be approved in the manner prescribed by Section 213 (a) are left within the express terms of Section 212 (b).

B. THE CONSTRUCTION ADOPTED BY THE COURT BELOW IS INCONSISTENT WITH THE STATUTORY SCHEME OF REGULATION

The Motor Carrier Act, 1935, established a comprehensive scheme for the regulation of common carriers by motor vehicle. The Act imposed upon the Commission the general duty to regulate such common carriers and to that end authorized it to establish reasonable requirements with respect to service, uniform accounts, record, qualifications, and maximum hours for employees and safety of operation and equipment (Sec. 204 (1)). Operation of common carriers by motor vehicles is pro-

hibited "unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations" (Sec. 206 (a)), and the manner of securing such a certificate is prescribed. Before granting any certificate the Commission must find that the applicant is fit, willing, and able to perform the services described in the application and that the proposed service is or will be required by the public convenience and necessity (Sec. 207 (a)).

All certificates must specify the service to be rendered, the termini and intermediate points or the territory to be served and such other reasonable terms, conditions, and limitations as the public interest requires (Sec. 208). As pointed out above, the suspension, revocation, amendment, and transfer of certificates are covered by Section 212. The Commission may authorize mergers and such mergers are relieved from the prohibitions of the anti-trust laws (Sec. 213 (f)). The issuance of securities (Sec. 214), the posting of surety bonds (Sec. 215), the rates and charges (Sec. 216), and the filing of tariffs (Sec. 217) are all subject to regulation by the Commission. In order to make such regulation effective the Commission may require reports to be filed (Sec. 220).

By the foregoing provisions Congress has sought to vest in the Commission complete regulatory authority over the operations of common carriers by motor vehicle. However, if the decision below

should be affirmed, the way is left open for holders of certificates to extend their operations without reference to the Commission by the simple device of purchasing a certificate from another holder.

It seems highly improbable that Congress intended to leave so great a gap in the Commission's power to regulate in view of the otherwise complete regulation provided by the Act. The Act does not require that result and it can only be reached by reading Section 213 "without the illumination of the scheme and purposes" of the Motor Carrier Act. Cf. concurring opinion in *L. Singer & Sons* v. *Union Pac. R. Co.*, No. 34, present Term.

Furthermore, if the lower court was correct the effective administration of the Act will be impossible. In order to perform adequately its duties under the Act the Commission must exercise close and continuous supervision over the filing of tariffs, compliance with safety regulations, filing of insurance policies, and similar matters. If the Commission has not even the power to secure notice of transfers involving 20 vehicles or less then it cannot exercise such supervision. Certificates of public convenience and necessity will become as difficult to trace as negotiable instruments. The Commission will be unable to ascertain the carriers subject to its regulation without undertaking burdensome investigations.

The extent of the administrative chaos which would result from this interpretation is apparent

from the fact that the overwhelming majority of all motor carriers operate less than ten vehicles.[7] If so large a number of carriers are permitted to transfer certificates freely among themselves the purposes of the Act will be defeated and its administration will be rendered impracticable. It is well established that a statute will not be construed to yield an absurd and impracticable result. The principle has been applied even where it required deviation from the literal language of the statute. *Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 458, 459; *United States* v. *Lacher,* 134 U. S. 624, 626, 628; *Silver* v. *Ladd,* 7 Wall. 219, 225–226; *United States* v. *Katz,* 271 U. S. 354, 357; *Sorrells* v. *United States,* 287 U. S. 435, 446–448; *Ash Sheep Co.* v. *United States,* 252 U. S. 159, 169–170. But since the literal language of the statute in this case yields a result that is consistent with the legislative purpose, it follows *a fortiori* that that purpose should be given effect.

[7] In 1935, the year that the statute was enacted, 61,216 concerns were engaged in operating motor carrier businesses. This included both intrastate and interstate operations. Of this number 58,305, or approximately 95% operated less than ten vehicles. The large number of small units in this industry is apparent from the fact that 40,093, or 65% of the total, operated only a single vehicle. Approximately 80% of those classified as interstate operators operated less than ten vehicles, and it should be noted that this category did not include all carriers subject to the Act. United States Department of Commerce, Census of Business 1935—*Motor Trucking for Hire*, page 63, table No. 5.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

FRANCIS BIDDLE,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
JAMES C. WILSON,
FOWLER HAMILTON,
S. R. BRITTINGHAM, Jr.,
Special Assistants to the Attorney General.

FEBRUARY 1941.

APPENDIX A

MOTOR CARRIER ACT, 1935 (c. 498, 49 STAT. 543; 49 U. S. C., SUPP. V., SEC. 312)

SUSPENSION, CHANGE, REVOCATION, AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES

SEC. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than ninety days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (d), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit,

or license, found by the Commission to have been violated by such holder.

(b) Except as provided in section 213, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

SEC. 213. (a) It shall be lawful, under the conditions specified below, but under no other conditions, for two or more motor carriers which are not also carriers by railroad to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and/or operation of the properties theretofore in separate ownership; or for any such motor carrier or two or more such carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another such carrier; or for any such motor carrier or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock; or for a person which is not a motor carrier or a carrier by railroad, or express, or water to acquire control of two or more motor carriers through ownership of their stock; or for any such person which has control of one or more motor carriers to acquire control of another such carrier through ownership of its stock; or for a carrier by railroad, express, or water to consolidate, or merge with, or acquire control of, any motor carrier or to purchase, lease, or contract to operate its properties, or any part thereof.

(1) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of

control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties or operations of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, and other parties known to have a substantial interest in the proceeding of the time and place for a public hearing. If after such hearing the Commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier other than a motor carrier is an applicant, or any person which is controlled by such a carrier other than a motor carrier or affiliated therewith within the meaning of section 5 (8) of part I, the Commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(2) Whenever a person which is not a motor carrier is authorized, by an order entered under subparagraph (1) of this section, to acquire control of any such carrier or of two or more such

carriers, such person thereafter shall, to the extent provided by the Commission, for the purposes of section 204 (a) (1), and section 220 (a) and (b), relating to accounts, records, and reports, and to the inspection of facilities and records, including the penalties applicable in the case of violations thereof, be subject to the provisions of this part.

(b) (1) It shall be unlawful for any person, except as provided in paragraph (a), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more motor carriers which are not also carriers by railroad, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this part and in violation of this paragraph. As used in this paragraph, the words "control or management" shall be construed to include the power to exercise control or management.

(2) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (b) (1) of this section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action consistent with the provisions of this part as may be necessary, in the opinion of

the Commission, to prevent further violation of such provisions.

(3) For the purposes of this section, wherever reference is made to control, it is immaterial whether such control is direct or indirect.

(c) The district courts of the United States shall have jurisdiction upon the application of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

(d) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraphs (a) or (b), as it may deem necessary or appropriate.

(e) Except where a carrier other than a motor carrier is an applicant or any person which is controlled by such a carrier or carriers by railroad or affiliated therewith within the meaning of section 5 (8) of part I, the provisions of this section requiring authority from the Commission for consolidation, merger, purchase, lease, operating contract, or acquisition of control shall not apply where the total number of motor vehicles involved is not more than twenty.

(f) The carriers and any person affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the "antitrust laws", as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints, and monopolies, and for other purposes", approved Oc-

tober 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

APPENDIX B

Pursuant to section 212 (b) of the Motor Carrier Act, 1935, the Interstate Commerce Commission has issued the following rules and regulations:

RULE 1. *General.*—(a) As used herein, the term "transfer" shall include all transactions, not included within sections 210a (b) and 213[1] of said act, whether by pur-

[1] Section 213 (e) provides as follows:

Except where a carrier other than a motor carrier is an applicant or any person which is controlled by such a carrier or carriers by railroad or affiliated therewith within the meaning of section 5 (8) of part I, the provisions of this section requiring authority from the Commission for consolidation, merger, purchase, lease, operating contract, or acquisition of control shall not apply where the total number of motor vehicles involved is not more than twenty.

It, therefore, follows that, under certain circumstances, the transfer of operating rights is exempt from the provisions of section 213 if the total number of vehicles affected by the transaction, including those owned, operated or controlled by all of the parties is not more than 20. For example, if A, owning 10 vehicles, sells to B, owning 10 vehicles, the provisions of section 213 do not apply to the transaction. But if A, owning 11 vehicles, sells to B owning 10 vehicles, the provisions of section 213 apply, because the total number of vehicles involved is more than 20, and application for an order approving and authorizing the transaction must be made to this Commission and such authority obtained. For further example, if A, who operates 100 vehicles in his motor-carrier business, sells a portion of his operation to B, who operates 5 vehicles in his motor-carrier business, 5 vehi-

chase and sale, lease, contract to operate, or otherwise, whereby a right to operate as a motor carrier in interstate or foreign commerce arising out of the Motor Carrier Act, 1935, is transferred from one person to another. No transfer by means of an attempted pledge of any such rights or by any action purporting to foreclose a pledge upon or lien against any such rights, or by any attempt to levy execution against any such rights in satisfaction of any judgment or other claim against the holder thereof, shall be effective without compliance with these rules and regulations and the prior approval of the Commission as herein provided.

(b) The term "operating rights" as used herein includes the right to operate as a motor carrier in interstate or foreign commerce over a route or routes or within a specified territory, as authorized by the whole or any part of a certificate of public convenience and necessity or a permit issued by this Commission under the provisions of the Motor Carrier Act, 1935, or as authorized by those provisions of said act under which a motor carrier may continue operations pending consideration of its application to the Commission for a certificate or permit, or as recognized in the second proviso of section 206 (a) by reason of the holding of an intrastate certificate of public convenience and necessity. An operating right so recognized in the second proviso of section 206 (a) is hereinafter, for convenience, termed a "State operating right."

(c) For the purposes of transfer, operating rights may be divided as to routes or

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cles being operated in connection with the portion sold, the total number of vehicles involved would be 10, and the transaction would not be subject to the provisions of section 213.

territories, if such routes or territories are clearly severable and if the division thereof does not permit the creation of duplicate motor carrier operating rights. No division of operating rights based upon the class or classes of property authorized to be transported will be approved, unless it appears to the satisfaction of the Commission that the part of the operating rights sought to be transferred is, because of a difference in the nature or type of the service rendered, clearly distinguishable and severable from the remaining operating rights.

(d) No attempted transfer of any operating right shall be effective except upon full compliance with these rules and regulations and until after the Interstate Commerce Commission has approved such transfer as herein provided (except as provided in rule 7 (a)).

RULE 2. *Applications to Transfer, and Notifications.*—(a) Applications to transfer operating rights, and the notifications provided in rule 7 (a), shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information as the Commission shall prescribe.

(b) A verified original copy of any such application or notification and two additional copies thereof shall be filed with the Commission, and one copy thereof shall be delivered, in person or by mail, to the District Director or District Directors of the district or districts of the Bureau of Motor Carriers in which headquarters of each of the parties signing such application or notification is located, and one copy thereof to the Board, Commission, or official, (or to the Governor where there is no Board, Commission, or official), having authority to regu-

late the business of transportation by motor vehicle, of each State in which each of said parties operates. Proof of service of copies of the application or notification upon each of such persons shall be made in connection with and as a part of the original verified application or notification filed with the Commission.

(c) The transfer described in any such application shall be approved if it appears from the application or from any hearing held thereon or from any investigation thereof that the proposed transaction is one which is not subject to the provisions of section 213 of the Motor Carrier Act, 1935, and that the proposed transferee is fit, willing and able properly to perform the service authorized by the operating rights sought to be transferred, and to conform to the provisions of the Motor Carrier Act, 1935, and the requirements, rules and regulations of the Commission thereunder. Otherwise the application shall be denied.

RULE 3. *Transfers to fiduciaries.*—(a) The temporary continuance of motor carrier operations without prior compliance with the provisions of rule 2 hereof will be recognized as justified by the public interest in cases in which administrators or executors of deceased carriers, guardians of incapacitated carriers, a surviving partner or the surviving partners collectively of dissolved partnerships, or trustees, receivers, conservators, assignees or other such persons who are authorized by law to collect and preserve property of financially disabled carriers, desire to continue the operations of the carriers whom they succeed in interest.

(b) Immediately upon any such succession, and in any event not more than 10 days thereafter, the successor shall give notice of

the succession by a letter, properly enclosed in a stamped envelope, addressed to the Secretary of the Interstate Commerce Commission, Washington, D. C., stating the names of the motor carrier and of the successor, the date of the succession, the circumstances causing the succession, whether there has been any discontinuance of operations and, if so, for what period, and, if the representative capacity of the successor involves appointment by a judicial proceeding, a certified copy of such appointment.

(c) Successors under this rule may exercise the operating rights of the motor carrier whom they succeed so long as they act in a temporary and representative capacity or until the Commission shall otherwise order. All transfers by such successors to other persons shall be subject to all of the provisions of rule 2 of these rules and regulations.

(d) Successors as described by this rule shall operate in the name of the prior holder of the certificate, permit, or other operating right, followed also by the name of the successor and a designation of his capacity.[2] The use of such name on all papers filed in accordance with the Motor Carrier Act, 1935, or the rules and regulations prescribed thereunder, shall be sufficient compliance with any requirement, rule, or regulation

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[2] For example, if John Jones were a prior holder of a certificate or permit and if Richard Smith be the successor, the name used in the operation should be as follows:

John Jones, Richard Smith, Administrator; John Jones, Richard Smith, Executor; Jones & Smith, Richard Smith, Surviving partner; John Jones, Richard Smith, Guardian; John Jones, Richard Smith, Trustee; John Jones, Richard Smith, Receiver; John Jones, Richard Smith, Conservator; and John Jones, Richard Smith, Assignee.

that such papers be filed in the name of a holder of a certificate or permit.

RULE 4. *Leases and contracts to operate.*—In addition to the showing required under rule 2 hereof, applicants who seek approval of a transfer of operating rights for a limited period, whether by lease, operating contract, or otherwise, shall show in their application and establish by proof in support thereof the specific period for which such transfer is sought, the consideration for such transfer and the time and method of payment thereof, and that the applicants have agreed in writing that all operating rights involved in the transaction shall revert to the transferor at the expiration of said term, or upon discontinuance of operations thereunder by the transferee at any time prior to the expiration of said term. In any such case of reversion, the transferor shall give immediate notice of that fact to the Commission.

RULE 5. *Orders of Court.*—If any transfer presented to the Commission for approval shall also require the authority or approval of any court, applicants shall file with the Commission a certified copy of the order of the court authorizing the transfer of the operating rights involved, at the time of the filing of the application, or a certified copy of the order of court approving such transfer within 30 days after such transfer has been approved by the Commission.

RULE 6. *Abandoned or inactive operating rights.*—The transfer of any operating right under which operations are not being conducted at the time of the proposed transfer will be approved only upon a showing that the cessation of operations was caused by circumstances over which the holder of such

operating rights had no control, or that the motor carrier operations authorized under the operating rights sought to be transferred are required in the public interest.

RULE 7. *Transfers of rights under intrastate certificates.*—(*a*) A State operating right, as defined in rule 1 (b), shall not be transferred apart from the intrastate certificate upon which it is based, but may be transferred together with such intrastate certificate without application to and prior approval of the Interstate Commerce Commission under these rules and regulations, if the transfer of the latter shall have been approved by the State Commission, Board, or official having jurisdiction, and notification of such approval, accompanied by certified copy thereof, shall have been filed within 30 days of such approval with the Interstate Commerce Commission; and provided further, that after such transfer the operating rights of the transferee will be solely between places within a single State.

(*b*) If, after a transfer from or to the holder of a State-operating right, the operating rights of the transferee will not be solely between places within a single State, the transfer shall not be effective until the transferee has applied for and obtained the Commission's approval of the transfer under these rules and regulations.

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No. 616

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, APPELLANT

v.

LEAMON RESLER, AND LEAMON RESLER DOING BUSINESS AS RESLER TRUCK LINE AND AS BRADY TRUCK LINE.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

BRIEF OF THE RESPONDENT

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STATEMENT

The statement contained in the brief filed for the United States satisfactorily sets forth the facts in this matter, so we see no need of making a further statement other than to add that when the application by the respondent to purchase the rights of C. J. Brady, referred to in the brief for the United States, was dismissed on the respondent's request, such request was due to the fact that respondent had sold the certificate to a third party, to whom it was later transferred.

ARGUMENT

We agree with all statements made in appellant's brief as to the purpose of the Motor Carrier Act in

initiating a complete system of regulation by the Interstate Commerce Commission over the contract and common motor carriers in this country. We do disagree with appellant's interpretation of Sections 212 and 213 of the Motor Carrier Act of 1935. Appellant contends that the exemption found in the statute, which is set forth on page 10 of its brief, applies only to the procedure required in Section 213, and is separate and apart from the procedure required by Section 212. An analysis of these two sections will show the contrary. Section 212 (b) provides,

> "Except as provided in Section 213, any certificate or permit may be transferred pursuant to such rules and regulations as the Commission may prescribe".

Appellant contends that the above quoted language gives the Interstate Commerce Commission authority to require its approval before a transfer may be effected, where twenty (20) or fewer vehicles are involved. The power to approve a transfer necessarily carries with it the power to disapprove such a transfer, and wherein, in the language quoted, can be found any authority to disapprove a proposed transfer? No grounds are set forth upon which the Commission might base a disapproval. Such is not true as to Section 213, which section expressly provides that the Commission may approve a transfer, merger or acquisition of control only upon a finding that the transaction will be consistent with the public interest, and in the case of acquisition by a rail carrier upon a further finding that the transaction will be to public advantage in the rail operation and will not unduly restrain competition. But in Section 212 there is no basis established for disapproval of any proposed transfer, the

Commission merely being given the right to prescribe rules and regulations.

It is true that the Commission has issued the rule set forth in appellant's brief, found on pages 24 to 30 of appellant's brief, purporting to require the approval of the Commission before completion of a proposed transfer where twenty (20) or fewer vehicles are involved, but the Commission cannot issue a rule without authority of Congress, and if the Commission has no authority under the Motor Carrier Act to disapprove a transfer of a permit or a certificate where twenty (20) or fewer vehicles are involved, then of what purpose is a rule requiring its approval?

Appellant contends that the affirming of the lower Court's opinion would leave a great gap in the power of the Interstate Commerce Commission to regulate the motor carriers; that they would not even know who were the owners of the certificates. Such argument is specious, for the reason that the Commission is given full power to issue rules and regulations covering transfers where not more than twenty (20) vehicles are involved, and has the power thereunder to require notice to the Commission of the name, address, financial responsibility and other data concerning the purchaser, and has the power to require such purchaser to comply with all the rules and regulations concerning the filing of tariffs, carrying of insurance for the protection of the public and of the shippers, and any other rules and regulations affecting operations under the jurisdiction of the Interstate Commerce Commission.

The counsel for appellant has gone dehors the record on page 17 of their brief, to cite the number of motor

vehicle carriers operating less than ten (10) vehicles. This is all the more reason why the lower Court's opinion should be affirmed. If all of these carriers be required to go before the Interstate Commerce Commission, secure that tribunal's authority before effecting a transfer of an operation using one unit which involves a multitude of useless procedure, it is exactly the type which Congress sought to avoid by inserting the amendment to Section 213 mentioned in the foot-note on page 12 of appellant's brief, wherein Senator Wheeler, Chairman of the Senate Committee, after discussing the control given to the Interstate Commerce Commission, makes this statement, and we quote from the foot-note contained in appellant's brief:

> "***** An amendment made by the committee makes this jurisdiction applicable, except in the case of rail, express, or water carrier affiliations, only where the total number of vehicles involved is more than 20.
>
> In other words, we eliminated from this provision such a case, for example, as that of two small operators who might want to get together and we made it apply only to cases where they had more than 20 vehicles, so that the small operators could get together without the necessity of going through a great deal of red tape with the Commission."

Obviously, Senator Wheeler felt that the amendment to Section 213 exempting carriers operating twenty (20) or fewer vehicles did not only exempt such carriers from following the procedure outlined in Section 213, but also exempted such carriers from the necessity of securing any approval from the Interstate Commerce Commission, and we believe this intent is clearly expressed by the language of the Act. As stated by

appellant, this is a matter of first impression in the Courts, and strange to say the Interstate Commerce Commission itself has not directly passed upon this question, except negatively.

We wish to cite two decisions of the Interstate Commerce Commission, which we believe will clearly show that the Commission itself believes its power to approve exists only when more than twenty (20) vehicles are involved: In the matter of *P. & F. Motor Express, Inc.—Purchase—Henry H. Hunt et al.; No. MC-F-801, 1 Federal Carriers Cases, Page 339, Paragraph 7371*, this case came up on the question as to how many vehicles were involved. Division 5 of the Commission found that semi-trailers and tractors should be considered as separate units, thereby, in that case, involving more than twenty (20) vehicles. The majority opinion merely makes the decision above noted. Commissioner Lee concurring, states as follows:

> "Applicant is permitted by this decision to purchase the rights and property of the Hunts. This result is satisfactory, but, in my opinion, our approval is not necessary. In such a case, section 213 (e) of the Motor Carrier Act provides that our authority to consummate a purchase is not necessary 'where the total number of motor vehicles involved is not more than 20'. * * * * In my opinion, we should hold that applicant's eight tractors and eight trailers constitute eight motor vehicles, and that the Hunts' three tractors and three trailers count as three motor vehicles; and that these added to the seven trucks (five owned by applicant and two owned by the Hunts) make 18 motor vehicles. Counting a tractor and trailer combination as two vehicles extends our jurisdiction over pur-

chases which otherwise would not require our approval."

In *H. & K. Motor Transportation, Incorporated—Purchase—Roy H. Burry; No. MC-F-993, 1 Federal Carriers Cases, Page* 513, *Paragraph* 7463, the Commission stated as follows:

> "In approving the acquisition of the motor carrier rights of Tolan S. Miller by applicant, the Commission said: 'The instant transaction was consummated by applicant without our prior authority under section 213, under the mistaken belief that, as applicant then owned and operated only 17 motor vehicles and purchased only two vehicles from Miller, the transaction was exempt under Section 213 (e). However, as applicant, at the time in question, was controlled in a common interest with two other motor carriers (Brown and Huber Motor) the aggregate of whose vehicles exceeded 20, such consummation in advance of our approval was unlawful".

Thus, we see by negative expression, the Commission itself seems of the opinion that the consummation of a transfer without Commission approval is unlawful only where more than twenty (20) vehicles are involved. In this case, respondent, on April 14, 1939, filed an application with the Commission to purchase Brady. On October 17, 1939, no action had as yet been taken by the Commission on the application, at which time the application was dismissed. It was to avoid exactly such situations as happened in this case on sales between small carriers, that the exemption contained in Section 213 was inserted by amendment, and is why Senator Wheeler made the statements above referred to. Small carriers such as those, in many cases, would

be completely out of business and their rights extinguished by abandonment, as they might often have to wait six months and no telling how much longer for the Commission to go through its slow procedure of granting an approval, the necessity of which is not even established by statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

MARION F. JONES
HARRY S. SILVERSTEIN
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 616.—October Term, 1940.

The United States of America, Appellant, *vs.* Leamon Resler, etc., Appellee.	On Appeal from the United States District Court for the District of Colorado.

[April 14, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

This appeal presents two important questions affecting the administration of the Motor Carrier Act of 1935 (49 Stat. 543). The first is whether § 213(e) places beyond reach of § 212(b) transfers of operating rights where not more than twenty vehicles are involved. The second is whether the Interstate Commerce Commission possessed statutory authority to rule that assent of the Commission is a condition precedent to an effective transfer which is subject to § 212(b).

In July, 1940, the United States filed an information against appellee charging that he had engaged in interstate motor carrier operations over a specified route in Colorado without a certificate of public convenience and necessity required by § 206(a) of the Motor Carrier Act of 1935. Appellee filed a special plea in bar alleging in substance that he had not violated § 206(a) because he had acquired the requisite certificate from one Brady to whom it had been issued originally, and that the approval of the Interstate Commerce Commission was not necessary to validate that transfer. The District Court sustained this plea, and the United States appealed directly to this court. 34 Stat. 1246, 18 U. S. C. § 682. Counsel for appellant and appellee have stipulated that not more than twenty vehicles were involved in the transfer from Brady to appellee, and that the Interstate Commerce Commission has not approved that transfer.

The transfer is governed by § 212(b). That section provides: "Except as provided in section 213, any certificate or permit may be transferred pursuant to such rules and regulations as the [Inter-

state Commerce] Commission may prescribe." Section 213, regulating consolidations, mergers, and other acquisitions of control of motor carriers, provides in subsection (e) that " . . . the provisions of this section requiring authority from the Commission for consolidation, merger, purchase, lease, operating contract, or acquisition of control shall not apply where the total number of motor vehicles involved is not more than twenty."

The obvious sense of § 212(b) could hardly be expressed more aptly than in the language quoted. Section 213(e) is equally explicit. Read together, the two sections can mean only that a transfer involving not more than twenty vehicles is governed by § 212(b) and the regulations enacted pursuant to it. The phrase "Except as provided in § 213" was intended to remove from the sweep of § 212(b) only those transfers which were within the compass of § 213. It was never intended to place beyond reach of § 212(b) the transfers which § 213(e) expressly placed beyond reach of § 213.

Notwithstanding the fact that the instant transfer is subject to § 212(b), appellee challenges the Commission's authority to enact Rule 1(d) which provides: "No attempted transfer of any operating right shall be effective except upon full compliance with these rules and regulations and until after the Interstate Commerce Commission has approved such transfer as herein provided. . . ." Order of July 1, 1938, 3 Fed. Reg. 2157.

Power to make rules regulating the transfers embraced in § 212(b) derives from the phrase in that section "pursuant to such rules and regulations as the Commission may prescribe", and from § 204(a)(6) which makes it the duty of the Commission to "administer, execute, and enforce all provisions of [the Motor Carrier Act], to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration. . . ." Undoubtedly the power to prescribe regulations is not unlimited, but neither section provides or implies that the Commission is without authority to rule that parties to a proposed transfer which is governed by § 212(b) must first obtain the consent of the Commission. Indeed, the conclusion is inescapable that such a rule is clearly within the regulatory power which Congress intended to confer on the Commission; for Congress could insure effective enforcement of other sections of the Act only by granting

the Commission power to enact regulations broad enough to authorize Rule 1(d).

Sections 213(a) and 213(b) carefully provide in detail for the regulation of transfers of operating rights by merger, consolidation, or by other specified means. Section 213(a)(1) expressly stipulates that the approval of the Commission must precede a transfer which is subject to § 213. Manifestly, the administration of §§ 213(a) and 213(b) would be seriously hampered if the Commission were powerless to make the same requirement with respect to transfers subject to § 212(b), particularly since the number of vehicles involved may determine which section is applicable.

In many respects a transferee such as appellee stands in the same relation to the Commission as an original applicant for permission to operate. Many inquiries which are relevant to the initial application are equally relevant to the proposed transfer. Section 206(a), with immaterial exceptions, permits common carriers by motor vehicles to operate only if the carrier has first obtained a certificate of public convenience and necessity. Section 207(a) expressly conditions issuance of the certificate on findings by the Commission that the applicant is "fit, willing, and able properly to perform the service proposed and to conform to the provisions of [the Motor Carrier Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity." Plainly the finding of the requisite fitness, willingness, and ability of the first applicant is wholly inapplicable to his proposed transferee (see Rule 2(c), 3 Fed. Reg. 2158), and the operations inceptively authorized no longer may serve public convenience and necessity because conditions have changed. See Rule 6, 3 Fed. Reg. 2158; compare §§ 208(a), 212(a). It is evident that full enforcement of §§ 206(a) and 207(a) likewise would be impeded if the Commission lacked power to rule that its consent must precede a transfer subject to § 212(b).[1]

[1] Absent such power, the Commission would encounter similar difficulties in the administration of other sections. Section 215 requires the Commission to withhold a certificate until the carrier has complied with Commission regulations exacting security for damage to persons and property. Section 217 compels specified carriers to file tariff schedules. Section 221 obligates motor carriers to file written designations of agents for service of process and Commission orders.

See also §§ 220, 223.

We conclude that the Commission acted within its authority to prescribe rules and regulations to implement § 212(b) in ruling that its consent was a condition precedent to an effective transfer governed by that section. It was not compelled to contest the legality or propriety of such a transfer after it had been completed.

The judgment of the District Court is reversed and the cause is remanded for further proceedings.

A true copy.

Test:

Clerk, Supreme Court, U. S.